82-943

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

DORIS B. ROSSON and DORIS B. ROSSON,
t/a DOCTOR'S ANSWERING SERVICE
and/or GREATER MANASSAS ANSWERING SERVICE,

APPELLANT,

v.

CITY OF MANASSAS and F.R. HODGSON,
ZONING ADMINISTRATOR, CITY OF MANASSAS,

APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF
VIRGINIA

JURISDICTIONAL STATEMENT

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Questions Presented

I. Is a zoning ordinance violative of Section 1, of the 14th Amendment of the Constitution of the United States of America, if it prevents a widow, who lives alone, from conducting an occupation in her home with one or two employees, but permits the same use to be made of a home by a person who has an unlimited number of employees as long as they are all related and are occupants of the building?

II. Does a local government violate the provisions of Section 1, of the 14th Amendment of The Constitution of the United States when it:

a) Erroneously interprets and applies an otherwise constitutionally valid ordinance, in such a way that it permits a land use to

one citizen which it denies to another?

b) Restricts the conducting of home occupations in a residential district to persons who are occupants and related to each other, on the basis that it is the government's objective to preserve the family character of the neighborhood, while at the same time permitting uses such as "Adult Centers" and "group homes", hospitals and schools without restriction as to number of employees or relationship in the same residential district?

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The Opinion of the Supreme Court of Virginia, rendered on September 9, 1982, by the Honorable Chief Justice, Harry L. Carrico, appears in A. 1-20.

The Mandate of the Supreme Court of Virginia dated September 9, 1982, reversing and annulling the judgment of the Circuit Court of Prince William County, Virginia, and remanding the case to the court for the entry of a restraining order, appears in A. 39-40.

The Memorandum On Decision of the Circuit Court of Prince William County rendered on January 2, 1982, by the Honorable Percy Thornton, Jr., appears in A. 21-34.

The Judgment Order entered by the Circuit Court of Prince William County, on February 1, 1980, appears in A. 35-37.

Grounds of Jurisdiction

This is an appeal from a decision of the Supreme Court of Virginia rendered on September 9, 1982, upholding the validity and constitutionality of a zoning ordinance of the City of Manassas, Virginia. Notice of Appeal was filed on October 9, 1982, in the Supreme Court of Virginia, with service ofcopies on all parties as required by law.

A copy of the Notice of Appeal appears in A. 41-43.

Jurisdiction for this appeal is conferred on this Court by 28 U.S.C. § 1257(2), which provides as follows:

> "Final judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) ...
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Constitutional and Statutory Provisions

Constitution of the United States

Amendment XIV, Section 1 (Appears in A. 48).

Ordinances of the City of Manassas:

Section 1-34 - Appears in A.44, 45.

Section 3-1-1 - Appears in A.45, 46.

Section 9-1-1 - Appears in A.46.

Section 9-1-3- Appears in A. 46.

Section 9-1-4- Appears in A. 46, 47.

Statement Of The Case

The appellant, Doris B. Rosson, a widow, and citizen of the United States of America, resides alone in a dwelling in the City of Manassas, Commonwealth of

Virginia. The dwelling is a rather large substantial colonial type home, rather picturesque, being one of the most attractive homes in the area. The dwelling fronts on an extremely busy four lane highway. The traffic count in 1978, was over 14,000 cars in a single twelve hour period. In this residentially zoned neighborhood, and in the immediate vicinity of the Rosson residence, are several dwellings in which home occupations are being conducted, such as doctor's offices. Immediately across the highway from Rosson is a structure, which was once a dwelling, but is now being used as a real estate brokerage office.

In a small, approximately 6' x 13' room of her dwelling, as described above, Rosson conducts and operates a telephone answering service with never more than one of two part-time employees, present at the same time. Rosson also maintains and rents out, four small apartments in the dwelling. The answering service and rentals from the apartments provide Rosson with substantially all of her income.

There is absolutely nothing about the external appearances of the dwelling which would lead one to conclude or even suspect that the property was anything

but a single family dwelling. Yet, Rosson was and is making three separate and distinct uses of her property, simultaneously, to-wit:

1) A residential use- permitted under the City's zoning ordinances in the zone in which Rosson's property was located, viz - R-1.

2) Rental of apartments - or an "apartment house" which is not permitted in the said R-1 zone, but is not a violation because of the City's ordinances relating to nonconforming uses. Sections 9-1-1, et seq., which appear in A.46-47. This use was being made of the property at the time that the zoning ordinance was adopted by the City of Manassas.

3) The challenged use of her property for the operation of a telephone answering service, which the City claimed and is claiming, violated Sections 3-1-1 and 1-34a, of the Zoning Ordinances of the City of Manassas.

On the 7th day of December, 1978, the City's prosecution of Rosson began and this case was born. Rosson was charged with the operation of a business in a residential district in violation of the zoning ordinances of the City of Manassas, Virginia. Upon being found guilty by the Prince William County

General District Court, of violating Section 3-1-1 and Section 1-34a, Zoning Ordinance of the City of Manassas, Rosson appealed to the Circuit Court of Prince William County, Virginia. Section 3-1-1 of the Ordinance, which appears in A. 45, 46, lists the uses which may be made of property in the residential or R-1, zone. Section 1-34a, which appears in A. 44-45, defines a "home occupation" as an occupation conducted in a residential dwelling unit and restricted to persons who are related and residing in the dwelling. During the pendency of the appeal, City filed a chancery suit in the said Circuit Court, seeking to enjoin Rosson from continuing with the operation of the answering service in her home. The criminal matter and chancery cause were heard together by the said Circuit Court.

City's position, in the trial court, as well as in the Supreme Court of Virginia, was and is essentially that the discrimination inherrent in Section 1-34(a) of it's zoning ordinance is justified as an exercise of its police power, to preserve the existing residential character of residential

areas by restricting the size of home occupations. The contention of Rosson was and is that this is precisely what the ordinance does not do. Rosson argued in the trial court as well as in the Supreme Court, that by restricting the home occupation to occupants who were related, without any restriction as to number of employees, the ordinance did not limit the quantitative use of the property at all, it only attempted to limit the qualitative use which will be made of the property, and thus its discriminatory effects could not be justified.

Rosson also pointed out, in the trial court as well as in the Supreme Court of Virginia, that the same Ordinance permits the following uses in the Residential District, R-1: Group Homes, Homes for adults, schools, hospitals and churches, without any limitation as to number of employees or relationship of any kind. Rosson also proved in the trial court, and addressed in the Supreme Court of Virginia, the erroneous and discriminatory application of another section of the same zoning ordinance. Section 9-1-1 of the City's

Zoning Ordinance, provides:

> "If at the time of the enactment of this ordinance any legal activity which is being pursued, or any lot or structure legally utilized in a manner or for a purpose which does not conform to the provisions of this ordinance, such manner of use or purpose may be continued as herein provided."

At the time that the City's Zoning ordinance was adopted the following two uses (among others) were being made of property in Rosson's Neighborhood:

a) The use of the Rosson property as an apartment house.

b) The use by a Dr. William Jamison, of a dwelling immediately across the highway from the Rosson property, as a professional medical office, which employed his wife and one part-time employee.

So, then, at the time that the City of Manassas adopted the zoning ordinance, the use of the Rosson property as and for an apartment house, and the use of Dr. Jamison's property as a professional medical office - home occupation - were "grandfathered" in under the ordinance.

Another section of the zoning ordinance, Section 9-1-3, provides:

> "If any non-conforming use (structure or activity) is discontinued for a period exceeding one year (1) year after the enactment of this ordinance, it shall then conform to the requirements of this ordinance."

Dr. Jamison, who was a medical doctor, licensed by the Commonwealth of Virginia to practice medicine, died subsequent to the adoption of the said zoning code by the City of Manassas. The dwelling was never used for the practice of medicine again after his death. Over one year and-a-half after his death, his widow, Mrs. Jamison, sold the property to an entity known as Wright Realty. Wright Realty received permission from the City of Manassas to conduct and operate a real estate brokerage business from said dwelling without any requirement as to residency or occupancy. The business has between 11 - 13 sales agents going in and out of the premises, plus what ever number of customers they are able to generate by their activity.

The City argued that the terms of the ordinance were met because the use by Mrs. Jamison, as a registered nurse, in dispensing medication to the late Doctor's patients and collecting the

receivables, was actually a continuation of the former use as a licensed medical doctor's practice of medicine. Rosson of course argued against such a strained rationalization.

During the said one and one-half years that Mrs. Jamison dispensed medication, after the death of Dr. Jamison, she had no empoyees. This is also significant because another section of the City's zoning ordinance provides:

> "9-1-4. Whenever a non-conforming structure, lot or activity has been changed to a more limited non-conforming use, such use may only be changed to an even more limited use."

Rosson argued that, assuming that the use by Mrs. Jamison was a continuation of the former use, the Wright Realty use was a violation of this provision also since the use by Wright Realty was certainly a much larger or more extensive use than the use which Mrs. Jamison was making of the property after the death of her husband.

The trial court, paragraph 9, of Memorandum On Decision, (A.31), found that the foregoing handling of the Wright Realty use of the Jamison property was additional discrimination. The Supreme Court of Virginia disposed of the question

thus raised by observing, on page 10, of its Opinion as delivered by the Honorable Chief Justice Harry I. Carrico, that "...Even if we assume Wright Realty's use is wrongful we must reject this suggestion; the law does not follow the thesis that two wrongs make a right." (A. 19).

The trial court agreed with Rosson and held that the provisions of Section 1-34a of the subject zoning ordinance are "...discriminatory, arbitrary and unreasonable when applied to "non-family" or "single" residential property owners who desire to conduct a (limited) home occupation with "outside assistance." The trial court also held that the provisions of said ordinance "...are not substantially or reasonably related to the promotion or protection of the health, safety, and general welfare of the public," and "...that enforcement of said provisions would deprive the Respondent of a legitimate use of her property, and would therefore, be in violation of Article 1, of Section 11, Constitution of Virginia, and Section 1, 14th Amendment, Constitution of the United States of America. A. 47-48.

The trial court thereupon denied the injunctive relief sought by the City and dismissed the criminal action against Rosson.

The Supreme Court of Virginia, in reaching the question as to reasonableness of the "no outsider" restriction of the subject ordinance, found that there was enough evidence to make the question of the restriction's reasonableness "... at least fairly debatable. Hence, the presumption of reasonableness was not defeated." (A. 15). With this question out of the way the Court then went on to the question whether the "no outsider" restriction is rationally related to a permissible state objective." (A. 15). Pointing out that Sections 15.1-427 and 15.1-489 of the Code of Virginia, established the legislative goal of providing residential areas with healthy surroundings for family life and facilitating the creation of a convenient, attractive and harmonious community, it goes on to find that the "no outsider" restriction of the City of Manassas ordinance contributes directly and substantially to that objective. (A. 16). Hence, the Supreme Court of Virginia reversed the judgment of the

Circuit Court of Prince William County and remanded the case for the entry of an appropriate restraining order in accordance with the prayer of the City's petition. (A. 19-20).

On motion being made by Rosson, the Supreme Court of Virginia has granted a stay of its judgment pending this appeal.

The Questions Presented Are Substantial

This Court has said that Zoning is a complex and important function of the State. Mr. Justice Marshall, in his dissent to the majority decision in Village of Belle Terre et al., v. Bruce Boraas et al., 416 U.S. 1, 39 L. Ed 2d 797, 94 S. Ct. 1536, went a bit further and said "...It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." Our rights to life, liberty and the pursuit of happiness would not have much significance if they were not grounded on the right to own and use our property with due regard, of course, to the rights of others.

While it is true that superficially it may appear that Question No. 1, may

have already been dealt with by this Court in the Boraas case, the facts are quite different. In the Boraas case the Village was attempting to preserve existing conditions in a quiet village of only 220 homes. It was a community which restricted land use to one-family dwellings and excluded lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. In the instant case, however, Manassas is a city with heavy traffic, and not a quiet little village; some of the permitted uses in the residential neighborhood are hospitals, schools, group houses, adult centers and home occupations. More importantly, the restriction in the Boraas case to relationship had a substantial connection to the attainment of the end being sought-the exclusion of boarding houses, lodges and apartments from the Village, and thus preserving, insofar as practicable, the "family like" atmosphere and environment of the Village.

In the instant case, however, the family atmosphere had left the area, there was nothing left there to "preserve." The stated objective of the City was to limit the size of home occupations in a neighborhood in which home occupations

were being conducted. To limit the conduct of such occupations to occupants of the dwelling who were related by blood or marriage without any limitation as to the number who could be employed has no reasonable connection to accomplishing the stated objective.

Additional support for the substantiality of the questions presented, and why the Boraas case is not and should not be held as controlling, is found in the case of Village of Euclid v. Ambler Realty Company 272 U.S. 365, 71 L. Ed 303, 47 S.Ct. 114. Mr. Justice Sutherland, in speaking for the Court, said:

> "... In the realm of constitutional law, especially, this court has perceived theembarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as theyarise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the constitution as applied to the exercise of the flexible powers of police, with which we are here concerned."

Governments must be constrained in

their encroachment on the basic rights we hold as sacred. The subject ordinance, if permitted to stand, not only is but another encroachment on such rights, it also works a serious and grievous injustice on Rosson as well as on every citizen of this land who is similarly situated. A consideration of some of the possible results of the enforcement of such an ordinance might serve as yet another reason why this case should be heard by this Court. For instance, what dies the person do, who has built up a business in his or her home with the aid of two children, as employees, who are in turn supported by the parent from the income derived from the business, when the children leave? Is he or she then added to the ever increasing welfare rolls?

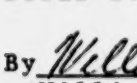
Finnally, the question is substantial because a citizen has been discriminated against to her great prejudice and injury. Not only because of the enforcement of Section 1-34a of the City s zoning ordinance, she has also been injured because of the City's interpretation and application of Sections 9-1-1, 9-1-3 and 9-1-4,of said ordinance. Unless the Court corrects this injustice now, the

course of local governments will continue in the direction of even more encroachment on our precious bundle of rights which seems to be growing lighter as our burdens grow heavier.

Rosson, on her own behalf, as well as on the behalf of all other citizens similarly situated, or who may be so in the future, respectfully asks that she be given the opportunity to be heard. She has no other recourse for possible redress.

Respectfully Submitted

Doris B. Rosson, Appellant

By 

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Appendix A

Opinion of The Supreme Court of Virginia

In The Supreme Court of Virginia

Present: All the Justices

CITY OF MANASSAS, ET AL.

OPINION BY CHIEF JUSTICE HARRY L. CARRICO

V. Record No. 800642

September 9, 1982

DORIS B. ROSSON, ET AL.

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
Percy Thornton, Jr., Judge

The zoning ordinance of the City of Manassas permits a limited home occupation in a residential district; however, § 1-34(a) of the ordinance restricts the right to "the immediate family residing in the dwelling." The validity of §1-34(a) was challenged by Doris B. Rosson who, on December 7, 1978, was summoned to appear in general district court to answer a charge that she operated a business in a residential district in violation of the Manassas ordinance. Upon her conviction in general district court, she appealed to circuit

court.

While the appeal was pending, the zoning administrator of the City of Manassas filed in circuit court a petition for injunction seeking to restrain Mrs. Rosson from continuing to conduct a business in a residential district. The court considered the appeal and the petition together and, after a hearing, declared §1-34(a) of the Manassas ordinance unconstitutional. By order entered February 1, 1980, the court dismissed the criminal charge against Mrs. Rosson and denied the City's petition for injunction.[1] This appeal concerns

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[1]The February 1, 1980 order adjudicated the principles of the cause and stated it was "final." On February 21, 1980, another order was entered. According to Mrs. Rosson, the second order "took away the aspect of finality of the Judgement of February 1, 1980, and therefore raises the question as to whether this Appeal is from a final judgment." As we interpret the second order, however, it merely suspended the execution

only the denial of the injunction petition and presents the question whether § 1-34(a) is invalid in prohibiting "outside" employees in home occupations.

The record shows that Mrs. Rosson, a widow without immediate family, conducts a telephone answering service in her home on Sudley Road in Manassas. She employs two part-time workers to assist her; neither is related to her, and both reside elsewhere.

Mrs. Rosson's property is located in a single-family residential district that extends along both sides of Sudley Road, a four-lane, heavily traveled thoroughfare in Manassas. Within a short distance of Mrs. Rosson's home, a chiropractor, an orthopedic surgeon, and a general surgeon conduct their practices

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Fn. 1 cont'd: of the first order in accordance with the provisions of Code § 8.01-676.

in dwellings located on Sudley Road, Across the road from Mrs. Rosson's home, Wright Realty, Inc., operates a real estate business in a former dwelling. Two of the medical offices puport to qualify as valid limited home occupations. The other medical office and the real estate business claim valid status as non-conforming uses. Only the real estate business was shown to have "outside" employees.

On appeal, the City contends the trial court erred in holding § 1-34(a) invalid. Mrs. Rosson contends the court was correct because this section of the ordinance (1) "is not substantially or reasonably related to the accomplishment of the health, safety and general welfare of the people," (2) "is not reasonably suited to protecting and promoting harmonious residential areas," and (3) "does not comply with constitu-

tional requirements of equal protection, neither in its enactment nor in its application to the facts of this case, and in particular, to Rosson."

The applicable principles are well settled. In Board of Supervisors v. Carper, 200 Va. 653, 660, 107 S.E. 2d 390, 395 (1959), we said:

> The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on /the person/ who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.

And, in Fairfax County v. Snell Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974), we stated:

> Inherent in the presumption of legislative validity stated in Carper is a presumption of reasonableness. But, as Carper makes plain, the presumption of reasonableness is not absolute.

Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance "must be sustained." If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.

A fairly debatable question is presented "when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." Fairfax County v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975). The evidence required to raise a question to the fairly debatable level must be "not only substantial but relevant and material as well." Id. And, while a trial court's finding of unreasonableness in zoning action carries a presumption of correctness, we still accord the action its presumption of legislative validity in our review. Loudoun Co.v. Lerner, 221 Va. 30, 34-35, 267 S.E.2d 100, 103

(1980).

A zoning ordinance must not arbitrarily discriminate, either in terms or application. "When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws." Bd. Sup. James City County v. Rowe, 216 Va. 128, 140, 216 S.E.2d 199, 210 (1975). But, in reviewing zoning ordinances, the courts "deal with economic and social legislation where legislatures have historically drawn lines which (the courts) respect against the charge of violation of the Equal Protection Clause if the law be "reasonable not arbitrary'"... and bears 'a rational relationship to a (permissible) state objective.'" Village of Belle Terre v. Borass, 416 U.S. 1, 8 (1974).

Two Code sections are pertinent. Section 15.1-427, part of Title 15.1, Chapter 11, entitled "Planning, Subdivision of Land and Zoning," states that the "chapter is intended to encourage local governments to improve (the) public health, safety, convenience and welfare of (their) citizens and to plan for the future development of communities to the end... that residential areas be provided with healthy surrounding(s) for family life ...." Section 15.1-489, also part of Chapter 11, provides that "(z)oning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427" and that, "(t)o these ends, such ordinances shall be designed... (3) to facilitate the creation of a convenient, attractive and harmonious community..."

In our opinion, § 1-34(a) is sub-

stantially related to promotion of the public health, safety, and welfare, is reasonably suited to protection of harmonious residental areas, and does not in its terms arbitrarily discriminate. According these aspects ot the problem due deference, we believe that the enactment of the section reflects a proper exercise of the discretion vested in the legislative branch of local government, directed to the accomplishment of a legitimate state objective.

In the field of zoning, the line which '"separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.'" Belle Terre, 416 U.S. at 4, quoting from Euclid v. Ambler Co., 272 U.S. 365, 387 (1926). Where the question is whether to permit home occupations in residential areas and, if so, to what extent, the legislative body necessarily engages in

a balancing of interests that may vary from area to area as circumstances and conditions differ.

On one side is the pressure to continue the time-honored practice of permitting such persons as doctors, lawyers, music teachers, and dressmakers to practice their professions and pursue their occupations in their respective residences. On the other is the desire to preserve the residential character of areas designated for residential use. Both sides involve important considerations substantially affecting public health, safety, and welfare.

In making its decision in this type of case, a legislative body properly may consider the necessity of keeping residential areas free of disturbing noises, increased traffic, the hazard of moving and parked vehicles, and interference with quiet and open spaces for child-play. Belle Terre, 416 U.S. at 5. Also pertinent are

the possible consequences of permitting "outside" employees in home occupations:

> (W)hen the requirement for residence is dropped, what was a home becomes a professional building (where perhaps more than one doctor, lawyer, etc., may engage in the pursuit of his profession); or an erstwhile home is transformed into a place where the business of dressmaking or millinery or music instruction is conducted. Thus, a clearly discordant element is injected into a high-class residential district and erosion of the overall zoning scheme begins.

Keller v. Westfield, 39 N.J. Super. 430, 436, 121 A.2d 419, 422 (1956).

In avoidance of these consequences, Manassas sought to limit the quantum and scope of business activity in residential districts. Striking a balance between the competing interests, the City chose to permit home occupations in residential districts, restricting the right, however, to "the immediate family residing in the dwelling." We think this action presents a classic example of legislative discretion at work in aid of the public health, safety, and welfare.

We have held, however, that "no matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal." Alford v. Newport News, 220 Va. 584, 586, 260 S.E. 2d 241, 243 (1979). Here, Mrs. Rosson contends that, even conceding the desirability of promoting and protecting harmonious residential areas, a "no outsider" restriction in home occupations is unreasonable.

Mrs. Rosson argues that Manassas could have preserved the family character of residential districts and yet permitted "outside" employees in home occupations by limiting to two the number of such employees. We agree that this might have been a reasonable alternative, but it does not follow that it is the only reasonable plan or that the plan adopted by Manassas is unreasonable. Fairfax County v.

Jackson, 221 Va. 328, 335, 269 S.E. 2d 381, 386 (1980)

A similar argument was made in Belle Terre. There, an ordinance restricted land use, with certain exceptions, to one-family dwellings. The word "family" as used in the ordinance was defined to include "(o)ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit. (and a) number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage...." 416 U.S. at 2.

It was argued in Belle Terre that "if two unmarried people can consitute a 'family,' there is no reason why three or four may not." The court answered: "But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial

function." 416 U.S. at 8 (footnote omitted).

Mrs. Rosson argues further that we should hold the "no outsider" restriction not reasonably suited to promoting harmonious residential areas because "(t)he evidence produced through the City Council itself, including its Mayor, showed, by default, the unreasonableness of the (restriction). City did not come forward with any evidence to show (the restriction was) in fact reasonable. Therefore the evidence of unreasonableness defeated the presumption of reasonableness and the (restriction) should not be sustained."

We disagree with Mrs. Rosson. She does not tell us where in the record we can find evidence produced by the City which shows "by default," that the "no outsider" restriction is not reasonably suited to promotion of harmonious residential areas. We do find, however, a statement by the city manager, one of the City's witnesses, that is directly

on point:

> (T)here isnothing to my mind that could be any more damaging to a piece of residential property than to have a business spring up next door if it is not properly handled and in order to make sure that the business is not one that can get out-of-hand and be objectionable to the neighborhood, the best way in my opinion is to make sure that it is strictly operated by the people that live in the home.

We will assume for purposes of this discussion that Mrs. Rosson presented probative evidence of the unreasonableness of the "no outsider" restriction. Still, the statement of the city manager, and other evidence submitted by the City, was sufficient to make the question of the restriction's reasonableness at least fairly debatable. Hence, the presumption of reasonableness was not defeated.

This brings us to the equal protection question. As noted earlier, a zoning restriction is inviolate against an equal protection claim if it is reasonable and bears a rational relationship to a permissible state objective. Belle Terre

416 U.S. at 8. We have in the discussion just concluded upheld the reasonableness of the "no outsider" restriction. We now hold the restriction is rationally related to a permissible state objective.

Code§§ 15.1-427 and -489 establish the legislative goal of providing residential areas "with healthy surrounding(s) for family life" and facilitating "the creation of a convenient, attractive and harmonious community." The achievement of this goal is a permissible state objective. Belle Terre, 416 U.S. at 9. The "no outsider" restriction of the Manassas ordinance contributes directly and substantially to that objective. Hence, § 1-34(a) does not in its terms arbitrarily discriminate among those subject to its restriction.

Mrs. Rosson maintains, however, that, in application, §1-34(a) "discriminates against widows, the unmarried, and those ...not fortunate enough to have families."

[2] She says that, a widow with no immediate family, "she has been singled out for different, if not special, treatment."

The burden was upon Mrs. Rosson to prove she was the object of discrimination by showing she was treated differently from others similarly situated. She failed in this burden. She neither showed that another in her status, a single or widowed non-family property

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[2] A similar argument was made in Belle Terre: "It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together." The Court replied: "(T)here is no evidence to support (the argument); and the provision of the ordinance bringing within the definition of a 'family' two unmarried people belies the charge." 416 U.S. at 8.

The Manassas zoning ordinance contains a similar inclusive definition of 'family': "A number of persons not exceeding three, living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage." Section 1-25 (b). Inexplicably, although § 1-25 is printed in the appendix, neither party has alluded to the section in argument.

owner, had been permitted to use "outside" employees in a home occupation nor that her situation was similar to the one property owner in the neighborhood actually using "outside" employees. Wright Realty, Inc., is that one property owner.

Wright Realty claims valid status for its real estate business as a non-conforming use; the City recognizes this status. The record shows that, prior to the adoption of the City's zoning ordinance, Dr. William Jamison lived in, and conducted his practice from, the dwelling located on the property; he was assisted by his wife, who was a nurse, and one part-time employee. Following adoption of the ordinance, Dr. Jamison died. For approximately eighteen months following his death, his widow kept the office open to administer medication and to collect the doctor's accounts. Wright Realty then purchased the prperty and has since conducted a real estate business in the former dwelling.

The firm employs eleven to thirteen persons.

Mrs. Rosson asks: "(H)ow can City justify the change over from a medical office maintained in a dwelling in which (Dr. Jamison) lived... to a real estate office with no restriction as to number, relationship or residency of employees and treat this change as an extension of the non-conforming use which consisted of a doctor with two employees?"

In this question, Mrs. Rosson implies that the City's recognition of Wright Realty's non-conforming use is wrongful, resulting in discrimination against her, and she suggests that the wrong can be corrected only by permitting her to use "outside" employees in her business. Even if we assume Wright Realty's use is wrongful, we must reject this suggestion; the law does not follow the thesis that two wrongs make a right.

For the reasons assigned, the order

denying the City's petition for injunction will be reversed, and the case will be remanded for the entry of an appropriate restraining order in accordance with the prayer of the petition.

Reversed and Remanded

APPENDIX B

Lower Court Findings And Opinions:

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

EDWARD T. FREED,
Zoning Administrator,
City of Manassas,

Complainant

vs. Chancery No. 12064

DORIS B. ROSSON and
DORIS B. ROSSON, T/A
Doctor's Answering
Service and/or
Greater Manassas
Answering Service,

Respondent

COMMONWEALTH OF VIRGINIA,
CITY OF MANASSAS

vs. CRIMINAL NO. 8198

DORIS B. ROSSON

MEMORANDUM
ON
DECISION

ACTION:

Chancery No. 12064

The Complainant, EDWARD T. FREED, Zoning Administrator, City of Manassas, seeks to enjoin the Respondent, DORIS B. ROSSON, from using her property at 9014 Sudley Road, City of Manassas, Virginia, for a (limited) home occupation, a telephone answering service in which two part-time employees are engaged and who are not related to the Respondent nor

reside within the premises.

Criminal No. 8198

City of Manassas is prosecuting the Respondent for alleged violations ofSection 3-1-1 and Section 1-34a, Zoning Ordinance of City of Manassas and reaches this court on appeal by the Respondent from the General District Court.

RESPONSE:

The Respondent claims that the pertinent sections of the City's Zoning Ordiance, hereinafter referred to as Zoning Ordinance, are, to-wit:

> "Section 1-34 (Limited) Home Occupation conducted in a residential dwelling unit and restricted to:
>
> a. No person(s) other than the immediate family residing in the dwelling shall be engaged in such occupation."

is d(e)scriminatory, arbitrary and unreasonable and not related to the promotion of the health, safety and general welfare of the public and therefore illegal.

Further, that the functional aspects of the Section 1-34a deprives the Respondent of a ligitimate use of her property in violation of Article 1, Section 11, Constitution of Virginia and Section 1, 14th Amendment, Constitution of United States, and therefore unconstitutional.

DETERMINATION OF PERTINENT FACTS

1. The Respondent, a widow, with no family, solely operated a telephone answering service in her residence at 9014 Sudley Road, City of Manassas, Virginia, for two years prior to January, 1978, by obtaining a "business license" from the City of Manassas; the Respondent did not seek nor did the City of Manassas require a special use permit for such solely operated telephone answering service.

2. Subsequent to January, 1978, the Respondent purchased another telephone answering service; combined with her solely operated telephone answering service and engaged the services of two part-time employees, not related to the Respondent nor residing within the Respondent's premises, and in June, 1978 began operation of the subject telephone answering service in her residence at 9014 Sudley Road, City of Manassas; such operation continues to date.

3. The subject residence is divided into four apartments; located in the R-1, Residential District, of the Zoning Ordinance; such residence is a non-conforming structure in the R-1 zoning by reason of the four apartments therein; situated on a four lane, primary street

or road, connecting State Routes 28 and 234, for connection with Interstate Route 66.

4. In June, 1978, the Respondent, acting on advice from the Zoning Administrator, made application to the Board of Zoning Appeals of the City of Manassas for a variance on the requirement that no person(s) other than immediate family, residing in the dwelling, shall engage in such occupation; BZA denied such application on the ground that it did not have the authority to amend the ordinance.

5. Subsequent to the commencement of the subject cases, the Respondent, at the suggestion of the court, made application for a special use permit pursuant to the Zoning Ordinance, to the City Council of Manassas, together with an application, at the direction of her counsel, for rezoning the subject property from R-1 to B-1 and/or amending Section 1-34a, supra, to a less restrictive provision, City Council of Manassas denied the application for rezoning and request for the amendment, but did grant the Respondent a special use permit, which is subject to Section 1-34a, supra.

ISSUE:

Legality of Section 1-34a, Zoning Ordinance, to-wit:

"No person(s) other than immediate family residing in the dwelling shall be engaged in such occupation."

OPINION:

1. The law, including zoning and its rules and regulations, is founded on the principal of serving the individual citizen as a member of society as well as society in general; the law is not a cold, aloof instrument as a falcon perched on a limb which springs into action when trespass is made within the domain; the law inherently seeks justice for the individual; society's existence and survival by necessity infringes upon the rights of the individual, which invokes a constant balancing of mutual benefits. Thusly, the common law recognized that a property owner had a basic and vested right to use his property for any legitimate purpose, not constituting a nuisance. Necessity gave rise to infringements on such rights under the police power of government to protect and promote the health, safety and general welfare of the public. Gorich v. Fox, et als, 145 Va. 554, 560; 134 SE 914, 916 (1926).

"The legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety and for promotion of the general welfare."

2. The City of Manassas, under the enabling statutes of Title 15.1, Chapter 11, Code of Virginia of 1950, as amended, has enacted a Zoning Ordinance and prescribed certain rules and regulations therein, including Section 1-34a, supra. Unquestionably, the City of Manassas has the police power in matters of zoning to protect and promote the health, safety, morals and general welfare of the public. Succinctly stated, does Section 1-34a, supra, and the functional aspects thereof, strike a balance between private property rights and public interests; in the subject case, has public power over private property rights been exercised judiciously and equitably? (Board of Supv. of Fairfax County v. Snell Const. Corp., 214 Va 665, 202 SE2d 889)

3. Public or police power is not without limitation and to override the honored and revered common law right of use, such restrictions must not unreasonably, arbitrarily or capriciously deprive a person of the legitimate use of his pro-

erty. (Bd. of Supv. of Fairfax County v. Carper, 200 Va 653, 107 SE2d, 397)

4. In the exercise of the police power there must be a substantial relationship to the protection and promotion of public health, safety, morals and general welfare. (Bd. of Supv. of James City v. Rowe, 216 Va. 128, 216 SE2d 199)

5. The means employed in the exercise of the police power must be reasonably suited to achieve the goal of protecting and promoting the public health, safety and general welfare. (Alford v. City of Newport News, Advance Sheets - November 21, 1979):

"But no matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal."

6. It is clear that the Respondent is using her property for a legitimate purpose under the Zoning Ordinance and so recognized by the City of Manassas in granting of the special use permit for the telephone answering service, subject to the restriction of Section 1-34a, supra. Further, the functional aspects of Section 1-34a unquestionably discriminates against the "non-family" or "single" residential property owners for limited home occupations

in the City of Manassas. The City contends that such discrimination is a proper exercise of its police power in protecting and promoting harmonious residential areas. The Respondent contends in essence that such discrimination is contrary to the laws stated above.

7. The evidence presented and personal inspection of the respective areas of Sudley Road by the court, discloses the following examples of home occupations thereon, to-wit:

a. Dr. Allen Marshall, Chiropractor, 9105 Sudley Road, a short distance from the subject property, has been issued a special use permit by the City to use his home as a professional office with no employee outside of his immediate family and reside within the premises.

b. Dr. Victor N. Guerrero, Orthopedic Surgeon, 9036 Sudley Road, likewise a short distance from the subject property, uses his home for professional offices under a "vested right" originating under a special use permit granted by the City to his predecessor, Dr. Bennett, another orthopedic surgeon.

c. Dr. George M. Berberian, General Surgeon, 9035 Sudley Road, likewise a short distance from the subject property, uses his home for professional offices under a special

use permit from the City.

(There is no evidence on whether or not Drs. Bennett, Guerrerro and Berberian have employed or presently employ persons outside of the immediate family and non-residents of the premises; there is the inference that Dr. Berberian does not reside within the premises at 9035 Sudley Road.)

c. Wright Realty, Inc., 9009 Sudley Road, across the street from the subject premises operates a real estate office, from the former residence of Dr. William Jamison, Thoracic Surgeon, who had his professional offices therein for many years prior to his death, and classified as a non-conforming use when incorporated into the City of Manassas; such premises are not used for any residential purpose.

8. Thusly, the functional aspect of Section 1-34a results in Dr. X, a "non-family" or "single" doctor, cannot operate his professional offices in his home as he requires the services of a nurse, while Dr. Z, a married doctor, in the same residential area, can operate his professional offices in his home as his wife serves as his nurse.

The same discrimination exists as to

other occupations or professions amenable to use of residences for such occupations. The rationale for such discrimination between "non-family" or "single" residential property owners, requiring limited outside assistance and the "family" residential property owners, employing services of the immediate family and residing in the premises, for home occupations is difficult to discern in achieving the legislative goal of protecting and promoting harmonious residential areas. It is conceivable that a "family" homeowner, with a large immediate family, residing in the residence and all engaged in the home occupation, could be more disruptive to the harmony of the subject residential area than the respondent with her two part-time employees in the telephone answering service from the subject residential structure containing four apartments.

9. Under closer scrutiny, and consideration of totality of circumstances and situations in the instant case, logic and common sense dictates that the patients and traffic engendered thereby of Drs. Marshall, Guerrero and Berberian with their professional signs and parking areas on their respective residences is more disruptive to the harmony of the subject residential area than two-part

time employees engaged in a telephone answering service from a apartment structure, without any identification that such services are being conducted therein.

Further, additional discrimination against the Respondent should be noted although, not decisive in this opinion, arises from City's position of construing the operation of a real estate office at 9009 Sudley Road, former residence and office of Dr. Jamison, as continuation of a nonconforming use, without any residents therein, for operation of Wright Realty, Inc. If character of the nonconforming use in existence at the time of imposition of the zoning restriction determines continuation of respective future non-conforming uses, then the change from a residence and doctor's office therein to a real estate office, without any residents therein in the R-1 zoning, demonstrates the City's position of applying different standards to their goal protecting and promoting harmonious residential areas. (Knowlton v. Browning-Ferris Industries, Advance Sheet of Supreme Court of Virginia, Record No. 780109, November 21, 1979)

10. The enactment of zoning regulations is not a scientific act; discretion of the legislative body must be recognized;

the functional aspects or results are in some degree arbitrary and discriminatory (West Bros. Brick Co. vs. City of Alexandria, 169 Va. 271, 192 SE 881). However, there is a basic difference in the discretion not to enlarge a zoning district or deny a specific rezoning request as in this instance of the City refusing to rezone from R-1 to B-1, and the discretion that excludes all "non-family" or "single" residential property owners from (limited) home occupations in the R-1 zoning throughout the City, with "outside" assistance, no matter how limited or extent of such assistance or employment; the adage that blood is thicker than water has little or no application in home occupation and protecting and promoting harmonious residential areas.

11. It is not the function of the judiciary to legislate, but within the realm of discretion, it is apparent that the City of Manassas can promulgate a more equitable, less discriminatory criteria on employment in home occupations; such position not to be construed that the City must allow (limited) home occupations in R-1 zoning; to the contrary, if home occupations are allowed, then the prescribed regulations should judiciously and equitably balance the public interest

and private property rights without flagrant discrimination.

12. The City's argument on the Respondent's failure to obtain a writ of certiorari on the ruling of the Board of Zoning Appeals is without merit; a board of zoning appeals has no power to legislate or repeal or amend the provisions of a zoning ordinance (Belle Homes Citizens Assoc. v. Schumann, 201 Va. 36, 109 SE2d, 139).

ACCORDINGLY, it is my decision to declare that Section 1-34a, Zoning Ordinance, City of Manassas, supra, illegal by reasons, to-wit:

1. Such provision is discriminatory, arbitrary and unreasonable when applied to "non-family" or "single" residential property owners desiring (limited) home occupation with "outside" assistance.

2. Subject provision is not substantially or reasonably related to protecting the health, safety and general welfare of the public.

3. Such provision is not reasonably suited to achievement of the legislative goal of protecting and promoting harmonious residential areas.

4. Such provision deprives the Respondent of a legitimate use of her

property in violation of Article I, Section II, Constitution of Virginia and Section 1, 14th Amendment, Constitution of United States.

ACCORDINGLY, the petition to enjoin is denied and the criminal prosecution against the Respondent is dismissed.

/S/ Percy Thornton, Jr.
JUDGE

DATE: January 2, 1980

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

EDWARD T. FREED,
Zoning Administrator,
City of Manassas,

Complainant

vs. CHANCERY NO. 12064

DORIS B. ROSSON and
Doris B. ROSSON, T/A
Doctor'S Answering Service
and/or Greater Manassas
Answering Service,

Respondent

COMMONWEALTH OF VIRGINIA,
CITY OF MANASSAS

VS. CRIMINAL NO. 8198

DORIS B. ROSSON

JUDGEMENT ORDER

These matters having come on for trial by the Court, trial by jury having been waived by the parties, on October 4, 1979, and not being concluded on that date, were continued over to October 24, 1979; whereupon the trial proceeded with the taking of testimony and the presentation of evidence by and through sworn witnesses and exhibits presented by the parties to this litigation, and upon the evidence thus presented, upon the oral arguments of counsel for the litigants, upon written

memorandum submitted by counsel, upon the papers formally read herein; and upon the Court having made certain findings of fact and conclusions of law as set forth in its "Memorandum on Decision" filed herein and made a part hereof,

It appearing to the Court that the provisions of Section 1-34a of the Zoning Ordinance, City of Manassas, are discriminatory, arbitrary and unreasonable when applied to "non-family" or "single" residential property owners desiring to conduct a (limited) home occupation with "outside" assistance, and

It further appearing to the Court that the said provisions of said Zoning Ordinance are not substantially or reasonably related to the protection or promotion of the health, safety, and general welfare of the public, and

It further appearing to the Court that the said provisions are not reasonably suited to achievement of the legislative goal of protecting and promoting harmonious residential areas, and

It further appearing to the Court that enforcement of said provisions would deprive the Respondent of a legitimate use of her property and would therefore,

be in violation of Article I, Section II, Constitution of Virginia and Section 1, 14th Amendment, Constitution of the United States of America, it is therefore,

ADJUDGED, ORDERED and DECREED that Section 1-34a, Zoning Ordinance, City of Manassas, State of Virginia, is illegal, and the petition to enjoin Doris B. Rosson and Doris B. Rosson, T/A Doctor's Answering Service and/or Greater Manassas Answering Service, being Chancery No. 12064 is hereby denied and the action is hence dismissed; and the criminal prosecution under the style of Commonwealth of Virginia, City of Manassas vs. Doris B. Rosson, bearing Criminal No. 8198, be likewise dismissed,

And this Judgement Order is final.

ENTERED THIS 1st DAY OF FEBRUARY, 1980.

/S/ PERCY THORNTON, JR.
PERCY THORNTON, JR.
JUDGE

I ask for this:

/S/ William J. LoPorto
William J. LoPorto
Counsel for Doris B. Rosson

Seen and objected to:

/S/ Robert W. Bendall
Robert W. Bendall
Counsel for Zoning Administrator
And City Of Manassas

APPENDIX C

Judgment Appealed From

See Appendix A

A-1 - A-20

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 9th day of September, 1982.

City of Manassas, and F. R. Hodgson, Zoning Administrator, City of Manassas, Appellants,

against Record No. 800642
Circuit Court Nos. 8198 and 12064

Doris B. Rosson and Doris B. Rosson, t/a Doctor's Answering Service and/or Greater Manassas Answering Service, Appellees,

Upon an appeal from a judgment rendered by the Circuit Court of Prince William County on the 1st day of February, 1980.

For reasons stated in writing and filed with the record, the court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for the entry of an appropriate restraining order in accordance with the prayer of the petition.

The appellants shall recover of the Appellees the costs expended in the prosecution of this appeal.

This order shall be certified to

the said circuit Court.

A Copy,

Teste:

/S/ Allen L. Lucy

Clerk

Apellants' costs:

Filing fee	$25.00
Printing brief - Code §14.1-182 - not to exceed $200	?
Printing appendix	?
Attorney's fee	50.00

Teste:

/S/Allen L. Lucy
Clerk

Appendix D

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

CITY OF MANASSAS, ET AL

Appellees

v. Record No. 800642

DORIS B. ROSSON, ET AL

Appellant

NOTICE OF APPEAL

Notice is hereby given that the Appellants, Doris B. Rosson, t/a Doctor's Answering Service and/or Greater Manassas Answering Service, do hereby appeal the judgment of the Supreme Court of Virginia entered herein on September 9, 1982, to the Supreme Court of The United States.

The part of said judgment being appealed from is that portion which holds Section 1-34(a) of the Zoning Ordinances of the City of Manassas, as applied to the said Doris B. Rosson, et al, and persons similarly situated, not to be in violation of Section 1, of Amendment XIV, of the Constitution of The United States and in reversing the decision of the Circuit Court of Prince William County entered on February 1, 1980, holding among other things, that the provisions

of the said Section 1-34 (a) of the Zoning Ordinances of the City of Manassas are discriminatory, arbitrary and unreasonable when applied to "non-family" or "single" residential property owners desiring to conduct a (limited) home occupation with "outside" assistance.

The Appeal is taken under and by virtue of the provisions of 28 USC Section 1257, and Section 1, of Amendment XIV, of the Constitution of the United States.

/S/DORIS B. ROSSON
DORIS B. ROSSON

By /S/ William J. LoPorto
William J. LoPorto, Counsel

CERTIFICATE OF SERVICE

This is to certify that on October 9, 1982, copies of the foregoing Notice of Appeal were mailed to each of the following persons or entities, by depositing said copies in the United States Post Office, at Callao, Virginia, with first class postage prepaid: Allen L. Lucy, Clerk, Supreme Court of Virginia, Supreme Court Building, Richmond, Virginia 23219; C.E. Gnadt, Clerk, Circuit Court of Prince William County, Court House, Manassas,

Virginia 22110; Turner T. Smith, City Attorney, 9253 Lee Avenue, P.O. Box 51, Manassas, Virginia 22110; and Robert W. Bendall, Assistant City Attorney, 9253 Lee Avenue, P.O. Box 51, Manassas, Virginia 22110.

/S/ William J. LoPorto
William J. LoPorto

Appendix E

Zoning Ordinances Of The City of Manassas

1-34. (Limited) Home Occupation: An occupation conducted in a residential dwelling unit and restricted to:

a. No person(s) other than the immediate(d) family residing in the dwelling shall be engaged in such occupation.

b. The dwelling unit for the limited home occupation shall be clearly incidental to the use of the dwelling for residential purposes and in no case shall more than twenty-five per cent of the area be used in conducting the limited home occupation.

c. No equipment or p(o)rcess shall be used in the limited home occupation which creates noise, vibration, glare, fumes, odors or electrical or radio interference, detectable to the normal senses off the premises.

d. There shall be no change in the outward appearance of the building or premises or other visible evidence of the conduct of the occupation

other than one sign, as defined in a separate section of this ordinance, such sign to be mounted flat against the wall of the principal dwelling units.

e. There shall be no group instruction, group assembly or group activity on the premises.

f. Such use shall be subject to securing a special use permit.

3-1-1 In Residential Distric R-1 any building to be erected or land to be used shall be restricted to the following uses:

A. Single-Family dwellings.

B. Public and semipublic uses such as schools, hospitals, churches, playgrounds, and parks.

C. Limited home occupations as defined.

D. Accessory buildings permitted as defined, however, garages or other accessory structures, such as carports, porches and stoops, attached to the mainbuilding shall be considered part of the main building. No accessory building shall be closer than one (1) foot to any property line.

E. Public utilities: Poles, lines, distribution transformers, pipes, meters, and other facilities necessary for the provision and maintenance of public utilities, including water and sewage facilities.

F. Group Homes as defined in Section 1-32-1 of this ordinance.

G. Homes for Adults as defined in Section 1-32-1 of this ordinance.

9-1-1. If at the time of enactment of this ordinance any legal activity which is being pursued, or any lot or structure legally utilized in a manner or for a purpose which does not conform to the provisions of this ordinance, such manner of use or purpose may be continued as herein provided.

9-1-3. If any nonconforming use (structure or activity) is discontinued for a period exceeding one (1) year after the enactment of this ordinance, it shall then conform to the requirements of this ordinance.

9-1-4. Whenever a nonconforming structure, lot or activity has been changed

to a more limited nonconforming use, such use may only be changed to an even more limited use.

CONSTITUTION OF VIRGINIA

ARTICLE I, §11

Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.-That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of

jurors for civil cases in courts of record to not less than five.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person whithin its jurisdiction the equal protection of the laws.

NO. 82-943

IN THE

Supreme Court of the United States

October Term, 1982

DORIS B. ROSSON and DORIS B. ROSSON,
t/a DOCTOR'S ANSWERING SERVICE
and/or GREATER MANASSAS ANSWERING SERVICE,

Appellant,

v.

CITY OF MANASSAS and F. R. HODGSON,
ZONING ADMINISTRATOR, CITY OF MANASSAS,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF VIRGINIA

MOTION TO AFFIRM
UNITED WITH MOTION TO DISMISS

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MOTION TO AFFIRM
UNITED WITH MOTION TO DISMISS

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED ARE NOT SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, FOR THE JUDGMENT RESTS ON ADEQUATE FEDERAL AND NONFEDERAL BASIS.

A. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS SUBSTANTIALLY AND REASONABLY RELATED TO PUBLIC HEALTH, SAFETY AND WELFARE.

B. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS REASONABLY SUITED TO ACHIEVE THE DESIRED LEGISLATIVE GOAL OF PROTECTING AND PROMOTING HARMONIOUS RESIDENTIAL AREAS.

C. REGULATIONS SIMILAR TO SECTION 1-34(a), RESTRICTING EMPLOYMENT IN CONNECTION WITH HOME OCCUPATIONS, HAVE LONG BEEN USED AND HAVE BEEN UPHELD BY THE COURTS.

D. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS VALID AND CONSTITUTIONAL AS CONSTRUED, ADMINISTERED AND APPLIED BY CITY TO ROSSON.

E. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS IN COMPLETE CONFORMITY WITH CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION IN THAT IT IS RATIONALLY BASED AND IS FREE OF INVIDIOUS DISCRIMINATION.

SUBJECT INDEX

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MOTION TO AFFIRM
UNITED WITH MOTION TO DISMISS

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE UNITED STATES SUPREME COURT:

THE CITY OF MANASSAS, VIRGINIA, a municipal corporation of The Commonwealth of Virginia, and F. R. HODGSON, ZONING ADMINISTRATOR FOR THE CITY OF MANASSAS, by counsel, hereby present and submit their MOTION TO AFFIRM the final judgment or decision of The Supreme Court of Virginia rendered on September 9, 1982, in a case styled City of Manassas, et al. v. Doris B. Rosson, et al., Record No. 800642, upholding the validity and constitutionality of a certain zoning provision of The City of Manassas zoning ordinance, and, united in the alternative, their MOTION TO DISMISS the Appellant's appeal for want of a substantial federal question.

For purposes of these motions, The City of Manassas, Virginia, a municipal corporation of The Commonwealth of Virginia, will be designated as "City." F. R. Hodgson, the present Zoning Administrator for the City of Manassas, together with Edward T. Freed, the Zoning Administrator for the City of Manassas on or about the 29th day of November, 1978, will be designated as "Zoning Administrator." Doris B. Rosson t/a Doctor's Answering Service and/or Greater Manassas Answering Service, will be designated as "Rosson."

Reference to the Appendix, submitted as part of the Appellant's Jurisdictional Statement, will be made by the designation (A. p. __).

I. STATEMENT OF THE CASE

The zoning ordinance of the City of Manassas permits a limited home occupation

in a residential district; however, Section 1-34(a) of the ordinance restricts the right to "the immediate family residing in the dwelling." (A. p. 44). The validity of Section 1-34(a) was challenged by Doris B. Rosson who, on December 7, 1978, was summoned to appear in the state General District Court to answer a charge that she operated a business in a residential district in violation of the Manassas ordinance. Upon her conviction in the state General District Court, she appealed to the Circuit Court of Prince William County, a court of record or trial court.

While the appeal was pending, the Zoning Administrator of the City of Manassas filed in Circuit Court a petition for injunction seeking to restrain Mrs. Rosson from continuing to conduct a business in a residential district. The trial court considered the appeal and the

petition together and, after a hearing, declared Section 1-34(a) of the Manassas ordinance unconstitutional. By order entered February 1, 1980, the trial court dismissed the criminal charge against Mrs. Rosson and denied the City's petition for injunction. (A. pp. 35-37). An appeal to the Supreme Court of Virginia, the highest court of the Commonwealth of Virginia in which a decision could be rendered, was granted The City of Manassas and its Zoning Administrator with respect to the denial of the injunction petition and presented the question whether Section 1-34(a) was invalid, on constitutional grounds, in prohibiting "outside" employees in home occupations.

The record showed that Mrs. Rosson, a widow without immediate family, conducted and continues to conduct, a telephone answering service in her home on Sudley Road in Manassas. Mrs. Rosson

employed two part-time workers to assist her; neither is related to her, and both resided elsewhere.

Mrs. Rosson's property is located in a single-family residential district that extends along both sides of Sudley Road, a four-lane, heavily-traveled thoroughfare in Manassas. Within a short distance of Mrs. Rosson's home, a chiropractor, an orthopedic surgeon, and a general surgeon conduct their practices in dwellings located on Sudley Road. Across the road from Mrs. Rosson's home, Wright Realty, Inc., operates a real estate business in a former dwelling. Two of the medical offices purport to qualify as valid limited home occupations. The other medical office and the real estate business claim valid status as non-conforming uses. Only the real estate business was shown to have "outside" employees.

On appeal to the Supreme Court of Virginia, the City contended the trial court erred in holding Section 1-34(a) invalid. The City asserted that the said section which restricts the right to "the immediate family residing in the dwelling" to engage in limited home occupation in residential districts was (1) substantially and reasonably related to the purposes and intent of zoning, (2) reasonably suited to the achievement of a valid legislative goal of protecting and promoting harmonious residential areas, and (3) was not discriminatory, arbitrary, unreasonable and violative of constitutional requirements of due process and equal protection either in its enactment or its application to Mrs. Rosson. On the other hand, Mrs. Rosson contended the trial court was correct because this section of the ordinance (1) "is not substantially or reasonably related to the accomplishment

of the health, safety and general welfare of the people," (2) "is not reasonably suited to protecting and promoting harmonious residential areas," and (3) "does not comply with constitutional requirements of equal protection, neither in its enactment nor in its application to the facts of this case, and in particular, to Rosson."

The Supreme Court of Virginia in its decision of September 9, 1982, upheld the validity and constitutionality of the City's zoning regulation and addressed each and every argument proffered by the Appellant herein. It is this decision (A. pp. 1-20, 39 and 40) that the Appellant seeks to appeal (A. pp. 41-43).

II. ARGUMENT

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED ARE NOT SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, FOR THE JUDGMENT RESTS ON ADEQUATE FEDERAL AND NONFEDERAL BASIS SO AS TO NEED NO FURTHER ARGUMENT.

A. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS SUBSTANTIALLY AND REASONABLY RELATED TO PUBLIC HEALTH, SAFETY AND WELFARE

This appeal should be dismissed and The Virginia Supreme Court decision affirmed summarily. The applicable principles are well-settled at both the state and federal level so as to no longer present a substantial federal question to require full, plenary consideration by the United States Supreme Court.

This Court and the Supreme Court of Virginia have taken the view that as a general rule a zoning regulation will be upheld as constitutional unless it is clearly arbitrary and unreasonable--that is, unless it has no substantial relation to the public health, safety, morals, or general welfare.

In this Court's landmark case of Euclid v. Ambler Realty Co., 272 U.S. 365,

394 (1926), this Court upheld the constitutionality of a village's comprehensive zoning plan for regulating and restricting such things as the location of trades, industries, apartment houses, two-family houses, single-family houses, the lot area to be built upon, and the size and height of buildings. As with the present case, the Euclid ordinance was attacked on the grounds that it violated the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution and certain similar provisions of the State constitution. (A. pp. 47 and 48).

This Court held then, and has consistently held since 1926, on such matters that the ordinances find their justification in the police powers, asserted for the public welfare. This Court has recognized that land-use regulation is within

the inherent police powers of the states and their political subdivisions. See Village of Belle Terre v. Boraas, 416 U.S. at 9 (1974); Berman v. Parker, 348 U.S. 26 at 32-33 (1954); Euclid v. Ambler Realty Co., 272 U.S. at 387.

This Court observed in Euclid that such legitimate zoning goals were sufficiently cogent to preclude this Court from saying, as it had to be said before the ordinance could be declared unconstitutional, that the provisions of such ordinances were clearly arbitrary and unreasonable, or having no substantial relation to the public health, safety, morals or general welfare.

Furthermore, this Court has previously held that there is a strong doctrine that legislation, such as zoning and land-use regulation, is presumed to be valid and its unconstitutionality is not to be presumed, but

must be clearly established and proven. Such regulation amounts to economic and social legislation which this Court will protect against a charge of violation of the Equal Protection Clause so long as the regulation is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. See Village of Belle Terre, 416 U.S. at 8.

The applicable principles in Virginia are also well settled. In Board of Supervisors v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959), the Virginia Supreme Court has said:

> The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on [the person] who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the

> public health, safety, morals or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.

And, in Fairfax County v. Snell Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974), the Virginia Supreme Court held:

> Inherent in the presumption of legislative validity stated in Carper is a presumption of reasonableness. But, as Carper makes plain, the presumption of reasonableness is not absolute. Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance "must be sustained." If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.

A fairly debatable question is presented "when the evidence offered in support of the opposing views would

lead objective and reasonable persons to reach different conclusions." Fairfax County v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975). The evidence required to raise a question to the fairly debatable level must be "not only substantial but relevant and material as well." Id., at 58, 216 Va. S.E.2d at 40. And, while a trial court's finding of unreasonableness in zoning action carries a presumption of correctness, the Virginia Supreme Court still accords the action its presumption of legislative validity in its review. See Loudoun Co. v. Lerner, 221 Va. 30, 34-35, 267 S.E.2d 100, 103 (1980).

This Court has also pointed out that if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. See Euclid v. Ambler Realty Co., 272 U.S. at

388. This Court has defined certain objectives as legitimate zoning goals. These legitimate zoning goals have been held to include the legal limiting of intrusion of commercial activities into residential areas, the maintenance of traditional family character in beautiful and healthy residential zones, the fostering of social homogeneity, by limiting "disturbing noises," "increased traffic," and the "hazards of moving and parked automobiles" and the providing of children with the "privilege of quiet and open spaces for play." See Euclid v. Ambler Realty Co., 272 U.S. at 394, and Village of Belle Terre v. Boraas, 416 U.S. at 9, and Berman v. Parker, 348 U.S. at 32-33.

In harmony with the guidelines of the United States Supreme Court, the Virginia high court has held, in Fairfax

County v. Snell, 214 Va. at 657, 202 S.E.2d at 892, that Chapter 11 of Title 15.1 (Planning, Subdivision and Zoning) of The Code of Virginia (1950) is

> ...intended to encourage local governments to improve public health, safety, convenience or welfare and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surroundings for family life; and that the growth of the community be consonant with the efficient and economical use of public funds. Va. Code Sec. 15.1-427 (Repl. Vol. 1973).

The restriction placed on limited home occupations by subsection (a) of Section 1-34 of the Zoning Ordinance of the City of Manassas conforms and complies with the purpose of zoning ordinances in that it is reasonably related to the general

purpose of zoning, that of promoting the health, safety and general welfare of the public and improving the health, safety, convenience, and welfare of the citizens of the City of Manassas. Most specifically, the restriction seeks to accomplish the objectives declared in Section 15.1-427 and 15.1-489 of The Code of Virginia (1950), as amended, that "residential areas be provided with healthy surroundings for family life which are convenient, attractive and harmonious," and that "[z]oning ordinances shall be for the general welfare of the public and of further accomplishing the objectives of Section 15.1-427" and that, "[t]o these ends, such ordinances shall be designed...(3) to facilitate the creation of a convenient, attractive and harmonious community..." By limiting the intrusion of commercial activities into residential areas, the restriction

maintains the traditional family character of the residential zones and fosters social homogeneity, by limiting "disturbing noises," "increased traffic," the "hazards of moving and parked automobiles" and by providing children with the "privilege of quiet and open spaces for play," all legitimate zoning goals permitted by Euclid, Village of Belle Terre, and Berman.

"A quiet place, where yards are wide, people few, and motor vehicles restricted, are legitimate guidelines in a land-use project addressed to family needs." Village of Belle Terre, 416 U.S. at 9. This goal is also a permissible one within this Court's decision of Berman. "The police power is not confined to the elimination of filth, stench and unhealthy places." It is proper to "lay out zones where family values, youth values, and

the blessings of quiet seclusion and clean air make the area a sanctuary for people." See Village of Belle Terre, 416 U.S. at 9.

B. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS REASONABLY SUITED TO ACHIEVE THE DESIRED LEGISLATIVE GOAL OF PROTECTING AND PROMOTING HARMONIOUS RESIDENTIAL AREAS.

In the field of zoning, the line which "separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." Euclid, 272 U.S. at 387. Where the question is whether to permit home occupations in residential areas and, if so, to what extent, the legislative body necessarily engages in a balancing of interests that may vary from area to area as circumstances and conditions differ. The Euclid Court further held that "[a] nuisance may be merely a right

thing in the wrong place,--like a pig in the parlor instead of the barnyard." Id., at 388.

Long before comprehensive zoning and the Euclid decision, people used their homes as places in which to work as well as to live. The piano teacher giving lessons in her living room, the dressmaker with her workshop alcove, and the barber with a chair in his basement were accepted members of middle-class residential neighborhoods. Many homes were used not only as residences, but as business offices, professional offices, repair shops, beauty parlors, laundries, studios, and rooming houses. See generally, 2 Anderson, American Law of Zoning, Section 13.01, at 508 (2d ed. 1976), and 2 Rathkopf, The Law of Zoning and Planning, Section 23.01, at 23-24 (4th ed. 1980).

When the early zoning ordinances were drafted, the proponents of zoning observed that home occupations were too numerous and too important to be terminated summarily. Accordingly, many were permitted to continue, subject to restrictions intended to render them so unobtrusive that they would not compromise the primary character of the residential neighborhoods. Professor Robert M. Anderson states in his treatise, 2 Anderson, supra, p. 19 , Section 13.01, at 508 and 509, that the custom of permitting certain accessory uses was described by Professor Bassett in Zoning, The Laws, Administration and Court Decisions During the First Twenty Years, at page 100 (1936) as follows:

> During the formative period of comprehensive zoning it became evident that the districts could not be confined to principal uses only. It had always been customary for occupants of homes to carry on

> gainful employments as something accessory and incidental to the residence use...The earliest zoning ordinances took communities as they existed and did not try to prevent customary practices that met with no objection from the community. Indeed there would have been great opposition to early zoning plans if efforts had been made to prevent doctors or dressmakers from using their homes in residential districts. Customary incidental home occupations are therefore allowed as accessory uses, even in new houses in residential districts. [Emphasis added]
>
> Accordingly, the advent of comprehensive zoning did not mark the demise of home occupations. It did initiate new definitions of those occupations, and a variety of restrictions on their expansion, the accommodation of the dwelling to their needs, and the exterior evidence of their existence. [Emphasis added]

In conformance with the principles of the Euclid decision, the Virginia Supreme Court has properly held that the legislative branch of local government, in the exercise of its police power, has wide discretion in the enactment of zoning ordinances. In Board of Supervisors v.

Carper, 200 Va. at 660, 107 S.E.2d at 395, and reaffirmed in Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971), The Virginia Court summarized the established principles of zoning law as follows:

> The general principles applicable to a judicial review of the validity of zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable, it must be sustained.

The Council of the City of Manassas had determined that in residential neighborhoods, a certain, limited amount

of business infringement would be desirable and permitted. In order to permit a limited infringement of business activity within residential zones, and yet to preserve, protect and promote harmonious residential areas, the legislative body permitted "limited home occupations" to be conducted in certain residential zones. City Council, in defining the permitted infringement, determined that business activity conducted by family members, to supplement family income, would not unduly destroy the residential character of the area.

Home occupations, by their very nature, are uses accessory to the main use of a dwelling as a residence. If the legislative language which describes or defines "home occupation" did no more than to characterize the use as accessory to the main use of the building as a residence, it would follow that the use

must be conducted by an occupant of the premises. Accordingly, most ordinances spell out the requirement that a home occupation must be carried on by an occupant of the residence with minimal, if any, assistance. See 2 Anderson, American Law of Zoning, Section 13.21, at 539 (2d ed. 1976); 6 Patrick J. Rohan, Zoning and Land Use Control, Section 40.03[3], at 40 (1978).

A common provision, to minimize the size or extent of the commercial nature of such occupations and to prevent the encroachment of offensive trades and the aesthetic values of clean air and quiet seclusion of the area from being adversely affected, is one which prohibits any employees, or limits the number of persons who may be engaged to assist in the conduct of a home occupation. The strictest limitation prohibits the employment of any person to assist in a

home occupation. More permissive, but probably effective under most circumstances, are provisions which exclude employees other than members of the family living on the premises. See 2 Anderson, American Law of Zoning, Section 13.22, at 539 (2d ed. 1976); Euclid, 272 U.S. at 388; Village of Belle Terre, 416 U.S. at 9.

A limited home occupation, as defined and limited by the specific provisions in the Zoning Ordinance of the City of Manassas, is intended to be a use that is incidental to the primary and permitted use of the dwelling for residential purposes. An activity that amounts to a "commercial enterprise" cannot reasonably be classified as mere incident or accessory to the residential use of a dwelling. Such "commercial enterprises" are, accordingly, not

permitted in residential areas as a matter of right, for to allow them would be to countenance commercial encroachment into areas zoned residential, under the guise of a limited home occupation.

The employment of non-resident assistants, "outside" employees, necessarily depicts a class of activities that is different in concept from a limited home occupation, as defined by the legislative body of the City of Manassas. The hiring of unrelated assistants suggests a primary commercial effort rather than a desire of the applicant to supplement and make a few extra dollars by home occupation or industry that is customarily incidental and accessory to the use of a residential dwelling. To enlarge the type or nature of business activities permitted to infringe, by permitting outside, unrelated

employees and thus a primary commercial effort, would open the entire City to the establishment of small businesses or commercial enterprises throughout residential areas and obliterate any lines of demarcation between business and residential use areas. By requiring businesses to be located within certain business zones, a municipality, acting pursuant to its legislative authority and authorization, and subject to the usual conditions respecting the exercise of police powers, may restrict the establishment of businesses or commercial activities or enterprises in particular areas or zones of the municipality. This is now a well-established general proposition of zoning law. Euclid v. Ambler Realty Co., 272 U.S. at 388. Accordingly, zoning legislation may validly create residential districts and exclude from such districts

most businesses and trades.

> The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that...the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. Id., at 388-389.

Such action has been upheld even as to commercial uses that are not inherently offensive to residential neighborhoods. Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968).

The R-1 residential zoning classification provided by Section 3-1-1 of the zoning ordinance of the City of Manassas (A. pp. 45-46) and the restrictions placed on limited home occupations by Section 1-34 (A. p. 44) are supportable because they (i) bear a rational relationship to the general welfare and (ii)

permit the landowner a reasonable use of his property.

On one side is the pressure to continue the time-honored practice of permitting such persons as doctors, lawyers, music teachers, and dressmakers to practive their professions and pursue their occupations in their respective residences. On the other is the desire to preserve the residential character of areas designated for residential use. Both sides involve important considerations substantially affecting the public health, safety, and welfare.

In making its decision in this type of case, a legislative body properly may consider the necessity of keeping residential areas free of disturbing noises, increased traffic, the hazard of moving and parked vehicles, and interference with quiet and open spaces for child-play. Euclid, 272 U.S. at 394; Village

of Belle Terre, 416 U.S. at 5. Also pertinent are the possible consequences of permitting "outside" employees in home occupations:

> [W]hen the requirement for residence is dropped, what was a home becomes a professional building (where perhaps more than one doctor, lawyer, etc., may engage in the pursuit of his profession); or an erstwhile home is transformed into a place where the business of dressmaking or millinery or music instruction is conducted. Thus, a clearly discordant element is injected into a high-class residential district and erosion of the overall zoning scheme begins.

Keller v. Westfield, 39 N.J. Super. 430, 436, 121 A.2d 419, 422 (1956).

In avoidance of these consequences, Manassas sought to limit the quantum and scope of business activity conducted in residential districts. Striking a balance between the competing interests, the City chose to permit home occupations in residential districts, restricting the right, however, to "the immediate family

residing in the dwelling." This action presented a classic example of legislative discretion at work in aid of the public health, safety, and welfare. The legislative judgment must be allowed to control in light of this Court's decision in Euclid, 272 U.S. at 388.

C. REGULATIONS SIMILAR TO SECTION 1-34(a), RESTRICTING EMPLOYMENT IN CONNECTION WITH HOME OCCUPATIONS, HAVE LONG BEEN USED AND HAVE BEEN UPHELD BY THE COURTS.

The restriction placed on limited home occupation by subsection (a) of Section 1-34 of the City of Manassas zoning ordinance is typical and comparable provisions appear in many other zoning ordinances. See, as a representative sample, LITTLE ROCK, ARK., ZONING ORDINANCE, Section 43-1(32) (1973); TAMPA, FLA., ZONING ORDINANCE, Section 39-1 (1966); CHARLOTTE, N.C., ZONING ORDINANCE, Section 23-32.1(9) (1973); ATLANTA, GA., ZONING ORDINANCE, Article III, Section 1 (1965);

NEWPORT NEWS, VA., ZONING ORDINANCE, Article II, Section 201(33) (1978); ARLINGTON, VA., ZONING ORDINANCE, Section 1 (1980); ALEXANDRIA, VA., ZONING ORDINANCE, Section 42-1(36) (1979); CHARLOTTESVILLE, VA., ZONING ORDINANCE, Section 31-3 (1979); EMPORIA, VA., ZONING ORDINANCE, Section 24-3 (1972); WAYNESBORO, VA., ZONING ORDINANCE, Section 27-2 (1964); RICHMOND, VA., ZONING ORDINANCE, Section 32.1-1220 (1978); CITY OF KILLEEN, TEX., ZONING ORDINANCE, Section 6-1 (1978); HAVERFORD TOWNSHIP, PA., ZONING ORDINANCE, Section 43 (1978); BOROUGH OF VERONA, N.J., ZONING ORDINANCE, Section 6.13 (1957); and CITY OF TULSA, OKLA., ZONING ORDINANCE, Section 12 (1962).

Regulations similar to Section 1-34(a) restricting employment in connection with home occupations, have long been used and have been upheld by the state supreme courts. Such regulations have

been found constitutional and reasonably suited to achieve the legitimate legislative goals of zoning presented in this case. See for example Lemp v. Township of Millburn, et al., 129 N.J.L. 221, 28 A.2d 767 (N.J. 1942); Keller v. Westfield, 39 N.J. Super. 430, 121 A.2d 419 (N.J. 1956); State v. Mair, 39 N.J. Super. 18, 120 A.2d 487 (N.J. 1956); North Hempstead v. White, 1 Misc. 2d 228, 144 N.Y.S.2d 358 (N.Y. 1955), aff'd 1 App. Div. 2d 781, 148 N.Y.S. 2d 461; Bourke v. Foster, 343 S.W.2d 208 (Mo. 1960); Cauvel v. City of Tulsa, 368 P.2d 368 (Okla. 1962); Jantausch v. Borough of Verona, 131 A.2d 881 (N.J. 1957); Good v. Zoning Hearing Board of Haverford Township, 384 A.2d 1374 (Pa. 1978); Parks v. The Board of Adjustment of the City of Killeen, 556 S.W.2d 365 (Tx. 1978); Holocomb v. City and County of

Denver, 606 P.2d 858 (Colo. 1980).

Section 1-34 of the Manassas Zoning Ordinance permits certain limited home occupations as secondary, supplementary uses within residential zones while attempting to preserve the existing character of the residential area by excluding prejudicial uses, and to provide for the development of the residential areas in a manner consistent with the uses for which they are intended.

It is clearly within the police power of the legislature to pass an ordinance limiting the number of outside, unrelated employees engaged in home occupations. If such an ordinance is passed in the interest of the health, safety, comfort or convenience of the public, or for the promotion of public welfare and is reasonable, then it is constitutional and valid. Eubank v.

City of Richmond, 110 Va. 749, 67 S.E. 376 (1910).

Zoning ordinances enjoy a strong presumption of constitutional validity. In harmony with the Euclid decision, the Virginia Supreme Court has established the following tests for determining whether the presumption of reasonableness or validity should stand or fail. If the presumptive reasonableness of zoning action is challenged by probative evidence of unreasonableness, the challenge must be met by evidence of reasonableness. If such evidence of reasonableness is sufficient to make the issue fairly debatable, the legislative action must be sustained; if not, the presumption is defeated by the evidence of unreasonableness and the legislative act cannot be sustained. Fairfax County v. Snell Corp., 214 Va. at 659, 202 S.E. 2d at 893. Therefore, in all cases where a party

chooses to attack the constitutionality of an ordinance, such party bears a heavy burden to demonstrate that the challenged ordinance is unconstitutional. This burden has not been met by Rosson in the present case. The City established the reasonableness of the restrictions and of the different treatment given to other business infringements in the area.

A statement by the City Manager, one of the City's witnesses, was directly on point:

> [T]here is nothing to my mind that could be any more damaging to a piece of residential property than to have a business spring up next door if it is not properly handled, and, in order to make sure that the business is not one that can get out-of-hand and be objectionable to the neighborhood, the best way in my opinion is to make sure that it is strictly operated by the people that live in the home.

The Virginia Supreme Court properly held that this statement of the City Manager,

and other evidence submitted by the City, was sufficient to make the question of the restriction's reasonableness at least fairly debatable. Hence, the presumption of reasonableness was not defeated.

When the restrictions placed on private property by the Manassas Zoning Ordinance are read as a whole, the ordinance must be found to strike a judicious balance between private property rights and the public interest. The restrictions, by necessity, limit the type of business activity that is tolerated within a residential zone, by limiting the quantum and scope of the business to that of a family business activity or "limited home occupation." Such restrictions, in limiting the scope of business infringement into residential areas, preserve the public health,

enhance the public safety from fires, aid in protection by police, and foster the public welfare by maintaining the traditional family character of the residential area, and increase the general prosperity of the neighborhood through social homogeneity. See Village of Belle Terre v. Boraas, 416 U.S. at 7.

It has been suggested by Rosson that the City of Manassas could promulgate a more equitable, less discriminatory, criteria on employment in home occupations which would balance the public interest and the private property rights without discrimination. Mrs. Rosson contended that, even conceding the desirability of promoting and protecting harmonious residential areas, a "no outsider" restriction in home occupations is unreasonable. Mrs. Rosson argued that Manassas could have preserved the family character of residential districts and

yet permitted "outside" employees in home occupations by limiting to two the number of such employees. The Virginia Supreme Court agreed that this might have been a reasonable alternative, but it does not follow that it is the only reasonable plan or that the plan adopted by Manassas is unreasonable. Fairfax County v. Jackson, 221 Va. 328, 335, 269 S.E.2d 381, 386 (1980); (A. pp. 12-13).

A similar argument was presented to the Supreme Court of the United States in Village of Belle Terre. The zoning ordinance, by its definition of "family," provided that not more than two unmarried people may constitute a "family." It can be said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. "But every line drawn by a legislature leaves some out that might well have been included. That exercise of

discretion, however, is a legislative, not a judicial, function." Village of Belle Terre v. Boraas, 416 U.S. at 8.

Mr. Justice Holmes, in Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928), made the point a half century ago in this manner:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to necessity behind it, the line or point seems to be arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or a point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark. [Emphasis added]

Legislative action is reasonable if the matter at issue is fairly debatable. Euclid v. Ambler Realty Co., 272 U.S. at

388; County of Fairfax v. Parker, 186 Va. 675, 680, 44 S.E.2d 9, 12 (1947). An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. Fairfax County v. Williams, 216 Va. at 58, 216 S.E.2d at 40. Therefore, where the City has adopted a standard or criteria and the standard suggested by the property owner might, for purposes of argument, both be appropriate to accomplish the desired legislative goal, a classic case of "fairly debatable" issue is presented. "Under such circumstances, it is not the property owner, or the courts, but the legislative body which has the prerogative to choose the applicable" criteria for "classification."

See Fairfax County v. Jackson, 221 Va. 328, 335, 269 S.E.2d 381 (1980). [Emphasis added].

D. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS VALID AND CONSTITUTIONAL AS CONSTRUED, ADMINISTERED AND APPLIED BY CITY TO ROSSON.

E. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS IN COMPLETE CONFORMITY WITH CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION IN THAT IT IS RATIONALLY BASED AND IS FREE OF INVIDIOUS DISCRIMINATION.

A zoning ordinance must not arbitrarily discriminate, either in terms or application. When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws. Bd. Sup. James City County v. Rowe, 216 Va. 128, 140,

216 S.E.2d 199, 210 (1975). But, in reviewing zoning ordinances, the courts "deal with economic and social legislation where legislatures have historically drawn lines which [the courts] respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable not arbitrary'" ... and bears 'a rational relationship to a [permissible] state objective.'" Village of Belle Terre v. Boraas, 416 U.S. at 8; Reed v. Reed, 404 U.S. 71, 76 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Therefore, a zoning restriction is inviolate against an equal protection claim if it is reasonable and bears a rational relationship to a permissible state objective. "No matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the

means employed are reasonably suited to the achievement of that goal." Alford v. Newport News, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979).

The Virginia Supreme Court properly concluded and upheld the reasonableness of the "no outsider" restriction and further held the restriction to be rationally related to a permissible state objective. See Gorieb v. Fox, 274 U.S. 603 (1927).

Section 1-34(a) of the Manassas Zoning Ordinance does not discriminate in its operation or application to Rosson and thereby does not deny Rosson the equal protection of the laws. Rosson has failed to show at any stage of this litigation, where she has been treated any differently from any other single person who is without family desiring to engage in a limited home

occupation. Rosson has been treated as all citizens "similarly situated" have been treated. Rosson has not been restricted nor treated differently when compared with other "similarly situated" non-residential uses within the same residential zone. No limited home occupation is conducted in the City of Manassas with the assistance of outside, non-related employees except that of Rosson.

Rosson was never able to show any invidious discrimination, but only inequality due to the fact she was widowed and desired to conduct a twenty-four hour telephone answering service from her residential home. Section 1-34(a), the Manassas Zoning Ordinance, does not offend the Equal Protection Clause merely because it is not prepared with mathematical precision, or because in practice it results in some inequality.

The regulation limits employment in home occupations to immediate family residing in the dwelling and bears alike and uniformly on all within the subject R-1 residential district. It is invidious discrimination and not simply inequality which is protected under the Equal Protection Clause. The fact that Rosson may experience some inequality because of the lack of family residing within her residential home does not preclude her from conducting her business in a properly zoned business zone and does not deny her equal protection of the law. See Louisville Gas, 277 U.S. at 41; Zahn v. Board of Public Works, 274 U.S. 325 (1927).

Virginia Code Sections 15.1-427 and 15.1-489 establish the legislative goal of providing residential areas "with healthy surrounding[s] for family life"

and facilitating "the creation of a convenient, attractive and harmonious community." The achievement of this goal is a permissible state objective. Belle Terre, 416 U.S. at 9. The "no outsider" restriction of the Manassas ordinance contributes directly and substantially to that objective. Hence, Section 1-34(a) does not in its terms arbitrarily discriminate among those subject to its restriction.

Rosson maintained, however, that, in application, Section 1-34(a) "discriminates against widows, the unmarried, and those...not fortunate enough to have families."[1] She says that, as a

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[1] A similar argument was made in Belle Terre: "It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together." This Court replied: "[T]here is no evidence to support [the argument]; and the provision of the ordinance bringing within the definition of a 'family' two unmarried people belies the charge." 416 U.S. at 8.

widow with no immediate family, "she has been singled out for different, if not special treatment."

However, not one scintilla of evidence was introduced to support this theory of applied or "functional" discrimination. The mere fact that certain uses have become protected, vested uses should not prevent enforcement of legitimate legislative goals. Dr. Allan Marshall, a chiropractor, acknowledged equal treatment under the law by the fact his profession was conducted subject to the restriction placed on outside employees.

The burden was upon Rosson to prove she was the object of discrimination by

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The Manassas zoning ordinance contains a similar inclusive definition of "family": "A number of persons not exceeding three living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage." Section 1-25(b), MANASSAS, VA., ZONING ORDINANCE.

showing she was treated differently from others "similarly situated." She failed in this burden. The mere reciting that there are other businesses or non-residential uses permitted in the same residential zone merely serves to confuse and obfuscate the real issues. Other business uses may and were shown to be permitted as vested uses either because they were permitted as nonconforming uses or in that such uses met the requirements of the then current law. She neither showed that another in her status, a single or widowed non-family property owner, had been permitted to use "outside" employees in a home occupation nor that her situation was similar to the one property owner in the neighborhood actually using "outside" employees.

Rosson has implied that the City's recognition of Wright Realty's nonconforming use and the location of group

homes, homes for adults, hospitals and schools within residentially zoned districts are wrongful, resulting in discrimination against her, and she suggested that the wrong can be corrected only by permitting her to use "outside" employees in her business (A. pp. 46 and 47). Even if we assume Wright Realty's use and the above identified uses were wrongful, this Court must likewise reject this suggestion; the law does not follow the thesis that two wrongs make a right. Furthermore, Rosson fails to represent to this Court that group homes and homes for adults are strictly regulated by the Manassas Zoning Ordinance and require the issuance of a special use permit, subjecting the use to reasonable conditions, from Council before such use may be carried on in a residential zone. Additionally, the inclusion of these group homes

within the R-1 district has been made by Council pursuant to the mandate of the General Assembly found in Section 15.1-486.2 of The Code of Virginia (1950).

Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961). "The specific zoning regulations" of The City of Manassas restricting employment to immediate family residing in a residential dwelling and requiring limited home occupations to be secondary or accessory to the main residential use "are exercises of the City's police power to protect the residents of" Manassas "from the

ill-effects of urbanization" by protecting the residential character of the zone and fostering social homogeneity and municipal tranquility. "Such governmental purposes long have been recognized as legitimate." See Agins v. City of Tiburon, 447 U.S. at 261 (1980).

Rosson is free to use her home as a residence and to pursue a reasonable or limited telephone answering service from her residential zone by conducting such a business without outside, unrelated employees. This Court has held that municipal zoning ordinances are not violative of the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation. Id., at 259. Therefore, it cannot be said that the impact of the City's restriction has denied Rosson "the justice and fairness guaranteed by the Fifth and Fourteenth Amendments." Id., at 259.

This Court has held in Berman that once an objective is within the authority of a legislative body, the means employed to attain that objective are for that body to determine. The legitimate goal in Manassas is the development of a better balanced and more attractive community with business located in business zones and residences located within residential zones, with the possible exception of secondary family enterprises to supplement family income. Once this goal was adopted, the legislature had the power to ordain reasonable laws under the police powers to accomplish such goal.

This case is clearly distinguishable from this Court's decisions in Schad v. Mt. Ephram, 451 U.S. 61 (1981), and Moore v. East Cleveland, 431 U.S. 494 (1977). The present case before this

Court does not involve an appeal based upon "fundamental rights" guaranteed by the Constitution such as the right of association, the right of privacy, the right of free speech or expression, or the right to make personal, private choices in matters of marriage and family life. The Manassas Zoning Ordinance under review has not attempted to limit any fundamental right guaranteed by the United States Constitution or the Constitution of Virginia.

Finally, as recently as July, 1981, this Court has reaffirmed the principles established in Belle Terre, which is now requested by the Appellant to be reviewed and overruled in this present appeal. In Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), this Court cited Belle Terre, with approval, in saying of the San Diego ordinance that

"the twin goals that the ordinance seeks to further--traffic safety and the appearance of the city--are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 93 L.Ed. 533, 69 S.Ct. 463 (1949), or esthetics, see Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L.Ed. 2d 797, 94 S.Ct. 1536 (1974); Berman v. Parker, 348 U.S. 26, 33, 99 L.Ed. 27, 75 S.Ct. 98 (1954)."

III. CONCLUSION

For the foregoing stated reasons, the Appellees, The City of Manassas, Virginia, and F. R. Hodgson, Zoning Administrator for The City of Manassas, pray that the Virginia Supreme Court decision rendered herein on September 9, 1982, be AFFIRMED and that this appeal noted to the United States Supreme Court be DISMISSED.

Respectfully submitted this 30th

day of December, 1982.

By: Robert W. Bendall

Robert W. Bendall*
Smith and Davenport

Turner T. Smith
Smith and Davenport

*On December 14, 1982, Mr. Bendall submitted the Required Oath, Application, Certificate, and Filing Fee for admission to practice before the Supreme Court of the United States. By telephone conversation on December 21, 1982, with the Clerk's Office of this Court, Mr. Bendall was informed that his application was in proper order and that admission would be granted and effective January 10, 1983.

CERTIFICATE AND AFFIDAVIT OF SERVICE

Pursuant to Rules 28.3 and 28.5(b) and (c) of The Rules of United States Supreme Court, I hereby certify that I have mailed, first-class postage prepaid, a true copy of the foregoing Motion to Affirm united with Motion to Dismiss to all parties required to be served and addressed to counsel of record as follows:

William J. LoPorto, Esq.
P. O. Box 367
Callao, Virginia 22435

This 29th day of December, 1982.

Robert W. Bendall

STATE OF VIRGINIA
AT LARGE, to-wit:

SUBSCRIBED AND SWORN to before me this 29th day of December, 1982.

Lori A. Carter
Notary Public

My commission expires September 19, 1983.